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# Content of Covenants in Leases

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## THE CONTENT OF COVENANTS IN LEASES

IN determining what covenants in a lease will run so as to be enforceable by or against the assignee of the lessee or lessor, the formula that has been consecrated to this problem is that the covenant "must affect the nature, quality, or value of the thing demised or the mode of occupying it." This phrase which was used by Lord ELLENBOROUGH in *Congleton v. Pattison*<sup>1</sup> is an expansion of the statement in *Spencer's case*<sup>2</sup> that such a covenant must "touch or concern the thing demised." A second statement not so frequently quoted is that of BEST, J., in *Vyvyan v. Arthur*<sup>3</sup> that "if it be beneficial without regard to his continuing owner of the estate, it is a mere collateral covenant upon which the assignee cannot sue." The purpose of this article is to examine the various covenants that have been held to be embraced within one or both of these two generalizations and to show that these covenants are in reality of three different species, each having its own legal characteristics.<sup>4</sup> Some preliminary observations must be made; the question as to what phraseology must be used in order to make a covenant run; the further question of whether, if a covenant is of a sort that may run it must run, or may nevertheless, if the parties so elect, be made purely personal, will not be considered; nor will the covenants for title be taken up.

The formula that a covenant runs if it affects the nature, quality, or value of the thing demised or the mode of occupying it, as giving a practical rule for settling whether any given covenant does or does not run, is *a priori* open to two objections. First, it is vague; the words "nature or quality" are not terms that have a legal meaning; they are popular merely; the phrase "thing demised" may include only the physical corpus, or it may include the estate; the latter part of the formula is fairly definite but it is applicable only to a portion of the covenants that have in fact been held to run. Second, the key words of the statement, i. e., the terms "nature, quality, and value," are more or less question-begging, particularly the word "value"; if a given covenant runs it will affect the value of the thing demised, if it does not it will not so affect it; but this fact is of no assistance in determining the primary question; this same ob-

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<sup>1</sup> 10 East 130 (1808).

<sup>2</sup> 5 Co. 16 a (1583).

<sup>3</sup> 1 B. & C. 410 (1823).

<sup>4</sup> No attempt will be made to cite all the cases of covenants. Collections of these cases will be found among other places in Sims, *Real Covenants* 116; 1 Smith's *Leading Cases*, 9th Ed. 185 & ff.; Foa, *Landlord and Tenant*, 4th Ed., 417 & ff.

jection in a less palpable way applies to the other two words. Without consuming more time in pointing out the unsatisfactoriness of the formula as a working rule, it will be more profitable to proceed to an analysis of the cases that have generally been said by the courts to be within the scope of this rule.

It is but repeating familiar learning to call attention to the fact that what is for the sake of brevity referred to as "title" in land embraces various rights and duties. This is true both of the lessor's title and the lessee's title. Taking up the title of the lessee, it may be pointed out that he has certain rights in the strict sense with correlative duties on the part of those against whom the rights exist, including among others the lessor; no further express mention will be made of these rights, it being understood that the conclusions hereinafter arrived at with respect to the rights next to be considered will also be true as a matter of principle with respect to the rights (in the strict sense) good against the lessor. In addition to these rights with their correlative duties the lessee has also those rights, in the loose sense, that are more exactly defined as permissive rights<sup>5</sup> or privileges,<sup>6</sup> i. e., there are certain courses of action which because he is the owner, in a qualified sense, of the land, he may pursue without violating the rights of other persons; he is under no duty to engage in these actions, he may legally do so if he wishes. Thus he may till the land in whole or in part, he may build on it, engage in business on it, sell his interest in it and perform various other acts upon it or with respect to it.

A covenant that restricts him in the exercise of any one or more of these privileges constitutes a direct contractual limitation upon the totality of legal rights that he would otherwise be free to exercise with respect to the demised premises, and where the covenant creates a restriction on a privilege of action as to the actual physical corpus it is clear that such a covenant does in the most literal sense affect "the thing demised." The propriety of holding such a covenant to run is obvious. It can have no significance save as it applies to the tenant in possession of the premises. Hence it is well settled that covenants of this sort will bind the assignees of the lessee. Among the covenants to refrain from acting which have been held enforceable by the lessor against the assign of the lessee are the following: to let part of the land lie fallow every year;<sup>7</sup>

<sup>5</sup> Terry—Anglo-American Law, pp. 90, 370. Salmond, Jurisp. 2nd Ed. p. 19 expresses the same idea by the term "liberty."

<sup>6</sup> This term is used by Professor Hohfeld in an article in 23 Yale L. J. pp. 16, 32. The term seems to be fully as expressive as either of the other two and more in accord with judicial usage and it has been used throughout this article.

<sup>7</sup> Cockson v. Cock, Cro. Jac. 125 (1607).

not to use for a particular business;<sup>8</sup> not to conduct the business in a specified way;<sup>9</sup> not to remove the fixtures;<sup>10</sup> not to sell off the wood.<sup>11</sup>

Take now the same kind of covenant made not by the lessee but by the lessor. The privileges with respect to the land possessed by the lessor are much fewer than those of the lessee, but the same principle should apply. A covenant by the lessor that under certain circumstances the lessee may remain in the demised premises after the expiration of his lease is a covenant of this sort and has been held binding on the lessor's assignee,<sup>12</sup> and there can be no doubt on principle that the same would be true of a covenant by the lessor not to enter and distrain for rent.

Reverting once more to a further analysis of the various rights embraced in the conception of title it should be noted that in addition to his privileges with respect to the physical corpus of the demise, the lessee has certain other rights in the loose sense, more exactly designated as powers<sup>13</sup> or facultative rights,<sup>14</sup> i. e. the de facto legal ability to affect those legal rights and relations which he has as lessee. This affecting may be done either directly, as where the lessee mortgages or assigns or subleases; or it may be

<sup>8</sup> *Doe d. Bish v. Keeling*, 1 M. & S. 95 (1813); *Doe d. Gaskell v. Spry*, 1 B. & Ald. 617 (1818); *De Forrest v. Byrne*, 1 Hilt. (N. Y.) 43 (1856); *Clements v. Wells*, L. R. 1 Eq. 200 (1865); *Rolls v. Miller*, L. R. 27 Ch. D. 71 (1884); *Hall v. Ewin*, L. R. 37 Ch. D. 74 (1887), injunctions against sublessees.

<sup>9</sup> *Crowe v. Riley*, 63 Oh. St. 1 (1900); *Granite Co. v. Greene*, 25 R. I. 586 (1904); *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619 (1897); *Wertheimer v. Judge*, 83 Mich. 56 (1890); *Stees v. Kranz*, 32 Minn. 313 (1884); last two cases injunctions against sublessees. In *Congleton v. Pattison*, 10 East 130 (1808) a covenant by the lessee for himself and assigns that no persons should be allowed to work in the demised mill until a certificate of their settlement should be given the lessor was held not to be enforceable by the lessor against the assignee of the lessee. For comment on this case see post p. 653. For other cases involving the same point as those already cited, see post p. 653.

<sup>10</sup> *Re Brick Co.*, 179 Fed. 525 (1910).

<sup>11</sup> *Verplanck v. Wright*, 23 Wend. (N. Y.) 506 (1840); contra, *Lymb v. Hart*, L. R. 29 Ch. D. 8, 19, (1883). This conflict is one of construction, not of principle. It is necessary to note whether the covenant purports to limit the privileges that belong to the tenant as the holder of the leasehold estate or as the owner of personal property. The latter kind of covenant is purely personal. Thus a covenant not to cut down the trees is a limitation upon the privileges of the lessee as owner for the time being of the soil, and should bind his assigns; a covenant not to sell off cut trees lying in the yard is on its face a covenant restricting a privilege belonging to the tenant as owner of a chattel. The court in the New York case might fairly have construed the covenant as really meaning that the lessee should not sever the growing timber from the premises by permitting it to be cut for purposes of sale. See post pp. 646 and following.

<sup>12</sup> *Callan v. McDaniel*, 72 Ala. 96 (1882). See also *Batchelder v. Dean*, 16 N. H. 265 (1844).

<sup>13</sup> See *Salmond, Jurisprudence*, 2d ed. § 76.

<sup>14</sup> See *Terry, Anglo-Am. Law*, p. 100.

done indirectly by taking steps which will create this power in some third person; that may be done voluntarily as where the lessee gives a third person a power of attorney to assign or sublease; or it may be done involuntarily as where the lessee engages in a course of action that causes him to be adjudged a bankrupt. With these powers there exists in the lessee the privilege of exercising them. The privilege of exercising one or more of these powers may be restricted by covenant in precisely the same way as the privileges with respect to the physical corpus of the lease. Such a covenant will bind the assignee of the lessee for the reasons already pointed out, viz. it can be operative only as it affects the tenant for the time being. It constitutes a contractual restriction of the use, not of the physical corpus, but of the estate. Such covenants are universally held to have come within the usual phrase and to "affect the thing demised." In other words the term "thing demised" must be held to include not only the land but the estate in the land. The most common illustration of this type is the covenant not to assign or sublease without the consent of the lessor.<sup>15</sup> The same principles apply to a covenant not to suffer the obtaining of a prescriptive right against the leased property,<sup>16</sup> and to a proviso for re-entry in case of bankruptcy.<sup>17</sup>

Corresponding covenants by the lessor may be either to restrict the exercise of the lessor's powers with respect to the estate of the lessee or to restrict the exercise of his powers with respect to his reversionary estate. A covenant that under certain circumstances he would not enter and forfeit the lease would be a covenant of the first sort.<sup>18</sup> This same principle would also seem applicable to a covenant by the lessor not to do an act that would give a third person the power to enter and forfeit the estate. Such a situation is suggested by the case of *Derwar v. Goodman*,<sup>19</sup> but it was not directly involved and hence was not discussed by the courts. A covenant by the lessor that under certain circumstances the rent should be

<sup>15</sup> *Williams v. Earle*, L. R. 3 Q. B. 739 (1868); *Brolaskey v. Hood*, 6 Phila. 193. In *Williams v. Earle* it is stated by way of dictum that while a covenant not to assign without the consent of the lessor will run, a covenant not to assign will not run. If this means that as a question of fact it may fairly be inferred from the form of the covenant that since the parties did not intend that the covenant should run because they did not contemplate the possibility of assignment, it is sound. If it means that as a matter of law such a covenant cannot run it seems unsound.

<sup>16</sup> *Bally v. Wells*, 3 Wils. 25 (1769).

<sup>17</sup> *Doe d. Bridgman v. David*, 1 C. M. & R. 405 (1834); compare *Horsley v. Steiger*, [1899] 2 Q. B. D. 79.

<sup>18</sup> Compare *Bamford v. Hayley*, 12 East 464 (1810).

<sup>19</sup> This case is considered at length, post pp. 650, 656, 658.

reduced, is a covenant that limits not the powers but the rights of the lessor in his reversionary estate. Such a covenant also runs.<sup>20</sup>

The most common illustration of a covenant restricting the powers of the lessor with respect to his reversionary estate is a covenant by the lessor to renew or extend the lease. Such a covenant is everywhere held to run both against the assignees of the reversion and in favor of the assignees of the lease.<sup>21</sup> The American cases hold the same way as to the covenant by the lessor to convey the fee.<sup>22</sup> In England it has, after some uncertainty, finally been held by the Court of Appeal<sup>23</sup> that such a covenant is personal. So far as the relation to the lessor's estate is concerned, both covenants are identical in that they limit the lessor's privilege of exercising his powers with respect thereto. These cases perhaps involve another principle and will be subsequently considered.<sup>24</sup>

If the foregoing analysis is correct, it follows that back of the loose phrase "nature, quality, or value of the thing demised" there is a perfectly clear-cut conception: viz., that of covenants restricting the privileges and powers of either lessee or lessor as such. There remains for examination a large number of covenants by the lessor or lessee that cannot be disposed of on the principles already discussed. An attempt to settle by the classical formula the question of the running of these widely varying covenants now to be considered reveals its lack of definiteness even more markedly than do the cases already examined. Some of the covenants of the class now to be taken up present no difficulty. The following covenants by the lessor have been held to enure to the assignee of the lessee: to rebuild<sup>25</sup> or repair<sup>26</sup> or plant<sup>27</sup> the premises; to supply water<sup>28</sup> or heat<sup>29</sup>. Of these covenants it may be said that they call

<sup>20</sup> *White v. Southend Hotel Co.*, [1897] 1 Ch. 767; *Allen v. Culver*, 3 Denio, (N. Y.) 284 (1846).

<sup>21</sup> *Isteed v. Stonely*, 1 And. 82 (1830); *Hyde v. Skinner*, 2 P. Williams 196 (1723); *Cook v. Jones*, 96 Ky. 283 (1894); *Leominster Gas Co. v. Hillery*, 197 Mass. 267 (1908); *McClintock v. Joyner*, 77 Miss. 678 (1900).

<sup>22</sup> *Blakeman v. Miller*, 136 Cal. 138 (1902); *Hollander v. Metal Co.*, 109 Md. 131 (1908); *Rockland Lime Co. v. Leary*, 203 N. Y. 469 (1911); *Hagar v. Buck*, 44 Vt. 285 (1872).

<sup>23</sup> *Woodall v. Clifton*, [1905] 2 Ch. 257; compare *Re Kensington Vestry*, L. R. 24 Ch. D. 199 (1883), L. R. 27 Ch. D. 394 (1884). Whether such a covenant, assuming it to be good so far as the principles here being discussed are concerned, would be bad as violating the policy expressed in the rule against perpetuities is not within the scope of this article.

<sup>24</sup> Post p. 655.

<sup>25</sup> *Pike v. Realty Co.*, 179 Fed. 97 (1910).

<sup>26</sup> *Gerzebek v. Lord*, 33 N. J. L. 240 (1869); *Myers v. Burns*, 35 N. Y. 269 (1866).

<sup>27</sup> See *Eccles v. Mills*, [1898] A. C. 360.

<sup>28</sup> *Jourdain v. Wilson*, 4 B. & Ald. 266 (1821).

<sup>29</sup> *Storand v. Vogel & Binder Co.*, 140 N. Y. App. Div. 671 (1910); compare *Jones v. Powers*, 163 Mass. 564 (1895).

either for action by the lessor upon the demised premises or at least for action that will be physically manifest upon those premises, and hence may be said in a very palpable way to touch or concern them. This criterion however will not apply to *Simpson v. Clayton*.<sup>30</sup> In that case A was tenant under a lease for three lives, he subleased part of the premises to X for 60 years and covenanted that if the head lease ran out first he would use his utmost endeavors to get it renewed. This covenant was held to run to X's assignee, and rightly, but it is only in a loose way that it can be said to relate to the sub-lease; so far as its subject matter goes, it is rather the head lease.

The same difficulty exists with respect to covenants by the lessee. Those that call for action upon the demised premises may be said without difficulty to "touch or concern the thing demised." Such are covenants to build on the demised premises,<sup>31</sup> to live upon them,<sup>32</sup> to keep them in repair,<sup>33</sup> to sink oil wells in them,<sup>34</sup> to consume and spread on the land as manure all hay raised thereon.<sup>35</sup> Compare, however, with these covenants the covenant by the lessee to keep the premises insured. If by statute the lessor can avail himself of the proceeds of the policy to apply in rebuilding,<sup>36</sup> or if the policy is to be taken in the name of the lessor for the time being,<sup>37</sup> the covenant runs; a mere covenant to insure does not.<sup>38</sup> No one presumably would question the soundness of this distinction, yet, so far as the covenants per se are concerned, both touch or concern the thing demised; they both call for the taking out of a policy upon the premises. Reference also may be made to *Sampson v. Easterby*.<sup>39</sup> The facts in that case were these: A owned certain veins of minerals, the adjacent soil being owned by a third person; A apparently had a right to erect a mill thereon. A leased the veins to X for a term of years and X covenanted to build an ore mill upon the adjacent land, which was not included within the demise. The owners of the vein had however the right to remove such building. One would have difficulty in saying that this covenant related

<sup>30</sup> 4 Bing. N. C. 758 (1838).

<sup>31</sup> Anon., Moore 159 (1584).

<sup>32</sup> *Tatem v. Chaplin*, 2 H. Bl. 133 (1793).

<sup>33</sup> *Dean of Windsor's Case*, 5 Co. 24 a. (1601); *Tilny v. Norris*, 1 Salk. 309 (1701).

<sup>34</sup> *Bradford Oil Co. v. Blair*, 113 Pa. St. 83 (1886).

<sup>35</sup> *Chapman v. Smith* [1907] 2 Ch. 97.

<sup>36</sup> *Vernon v. Smith*, 5 B. & Ald. 1 (1821).

<sup>37</sup> *Masury v. Southworth*, 9 Oh. St. 341 (1859); *Trust Co. v. Snyder's Admin.*, 76 Fed. 34 (1896).

<sup>38</sup> Compare *Reed v. McCrum*, 91 N. Y. 412 (1883); the dictum of Best, J., in *Vernon v. Smith* (supra) that such a covenant would run seems erroneous.

<sup>39</sup> 9 B. & C. 505 (1829); affirmed 6 Bing. 644 (1830).

to the nature, quality or value of the demised veins of ore; yet the covenant was held to run to the assignee of the reversion.<sup>40</sup>

The question now is this: is there any legal principle which runs through these cases and the others presently to be considered, not merely as a matter of coincidence, but as furnishing the ratio decidendi upon which, consciously or otherwise, the courts have proceeded? It is submitted that there is, and an examination of the various elements comprised in the conception of title will show what it is. Allusion has already been made<sup>41</sup> to some of the elements involved in this conception; to state it in more detail it may be said that the person who has title to land has with respect thereto certain rights in the narrow sense, privileges or permissive rights, powers or facultative rights, immunities and duties. The covenants first considered either limit some of these rights, privileges, or powers, possessed by the covenantor. The determining characteristic of the covenants now being considered is that they operate either to make more valuable some of the rights, privileges, or powers possessed by the covenantee or to relieve him in whole or in part of some of his duties. Or to restate the proposition in a somewhat less technical form; it will be noticed that the various covenants last mentioned as running have this characteristic, viz. that the act called for must operate to the benefit of the holder for the time being of the lease or reversion as the case may be. That is: the covenant might have been made to expire by its own terms when the original covenantee gave up his interest; if the performance is kept up it is intrinsically of such a nature that the person who will now have the primary interest in it is not the original covenantee but his successor in title, and as fast as any person in the chain of title parts with his title he will, not merely as a matter of limitations created by the language of the deed, but because of what it is that is to be done, cease to have any direct interest in the doing of that act. As stated in these general terms, or even in the more technical form first given, the principle is liable to misapplication and it is therefore advisable, before taking up other covenants that deserve special examination, to call attention to certain limitations that are implicit in the rule as stated but which may be overlooked. The first is this: where the covenant is of such a nature that the performance of it might equally well be made to enure to the bene-

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<sup>40</sup> It is possible, although the opinions nowhere expressly so state, that the right to erect a mill upon the adjacent premises was technically appurtenant to the lease of the veins. In such case it may be said that the covenant called for the exercise of a right appurtenant to the physical corpus of the demise and hence in a sense related to the thing demised.

<sup>41</sup> Ante p. 640-1.



fit of any given person, whether owner of an interest in the premises or not, it is essentially personal, and the agreement of the parties that the covenant is to enure to the benefit of the tenant or reversioner for the time being should make no difference. The tenant or reversioner is interested in the performance of this covenant, not because of his ownership of the land *per se*, but because he is *persona designata*.<sup>42</sup>

The second limitation is this: while it is true that a covenant of the sort now under consideration will not run unless it operates to the benefit of the rights of the lessor or lessee as such, the converse of this proposition is not true. It is easy to suggest covenants that will indirectly or mediately operate to the benefit of the covenantee with respect to his rights as owner of the soil, which clearly do not run. Thus a covenant by a lessor of farm lands that he will sell for the lessee all grain that shall be raised on the land and shipped to him would seem clearly to be a personal covenant. On the other hand a covenant by the lessor to maintain windbreaks upon the demised premises would be a real covenant. Yet both operate to make more valuable the privilege that the lessee has, as owner of the soil, of raising grain on it. The difference between the covenants of course is, and this is fundamental, that the first covenant operates primarily to benefit the covenantee not in the exercise of his privilege as owner of the soil but in the privilege that he has as owner of a chattel, of selling it; although this fact may in turn make more valuable the exercise of the privilege of raising grain. The second covenant, on the other hand, operates directly to make more valuable the exercise of the privilege of raising grain. The application of this distinction may in any case present two difficult questions; one of fact as to what privilege or power of the covenantee the covenant was primarily designed to and does protect, and one of law whether the privilege or power in question is one that he has as lessee or otherwise. Courts may be expected to differ in the conclusions to which they come on one or both of these points. The rule contended for, however, seems to be justified as a matter of principle and to furnish a rational connection between the covenant and the title with which it passes as an incident.

Again it may be pointed out that these covenants that have been held to run do not always operate exclusively for the benefit of the covenantee; if the premises are mortgaged, for example, the covenant to keep them insured so that the proceeds are available for rebuilding, or the covenant to pay the taxes, may be almost as

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<sup>42</sup> See *post* p. 648.

beneficial to the mortgagee as to the lessor. This, however, may be admitted without either affecting the soundness of the doctrine suggested or presenting any difficulty in the application thereof.

Taking up in detail the covenants which involve the principle just stated, no difficulty is presented by those of the lessee. In addition to the covenants already discussed<sup>43</sup> the following have also been held to run: to pay the taxes on the demised premises,<sup>44</sup> and to reimburse for damages caused the demised premises where the act would not constitute a violation of his duty as tenant.<sup>45</sup> On the other hand the following covenants by the lessee have been held to be purely personal: a covenant to pay taxes on other property of the lessor;<sup>46</sup> to erect a building on other lands of the lessor;<sup>47</sup> to pay the debts of the lessor.<sup>48</sup>

The covenants by the lessor other than those already considered,<sup>49</sup> while not wholly harmonious in their language, are for the most part, so far as their results are concerned, in accordance with the doctrine here contended for. One important group of such covenants is the covenant to pay for improvements made by the lessee upon the demised premises. Many of the decisions upon this covenant rest upon the ground that the covenant does not run because of failure to mention assigns,<sup>50</sup> or involve the question whether the covenant to pay runs after a breach by the original covenantor.<sup>51</sup> With these questions we have no concern.<sup>52</sup> The circumstances under which this covenant has been held to run will be found to be of this sort: there is first a covenant by the lessee to make the improvement—this covenant will bind the assignee of the lessee for reasons already discussed. The reciprocal covenant by the lessor has this content: it creates in the lessee, because of the improvements, some kind of interest other than that which would be created by the mere lease. This additional real interest in the demised premises will pass with them to the assignee thereof, and

<sup>43</sup> Ante pp. 644 and following.

<sup>44</sup> *Salisbury v. Shirley*, 66 Cal. 223 (1884); *Mason v. Smith*, 131 Mass. 510 (1881); *Astor v. Hoyt*, 5 Wend. (N. Y.) 603 (1830). Many cases turn simply upon the question of what taxes were meant to be thrown upon the lessee; see *Jeffrey v. Neale*, L. R. 6 C. P. 240 (1871), *Allum v. Dickinson*, L. R. 9 Q. B. D. 632 (1882).

<sup>45</sup> *Martyn v. Williams*, 1 H. & N. 817 (1857).

<sup>46</sup> *Gower v. Postmaster General*, 57 L. T. R. (N. S.) 527 (1887). See *Jeffrey v. Neale*, L. R. 6 C. P. 240 (1871).

<sup>47</sup> *Smith v. Arnold*, 3 Salk. 4 (1689); compare *Sampson v. Easterby*, ante p. 644.

<sup>48</sup> *Mayho v. Buckhurst*, Cro. Jac. 438 (1618); *Dolph v. White*, 12 N. Y. 296 (1855).

<sup>49</sup> Ante p. 643-4.

<sup>50</sup> See *Etowah v. Wills Valley Co.*, 121 Ala. 672 (1898); *Watson v. Gardner*, 119 Ill. 312 (1887); *Coffin v. Tallman*, 8 N. Y. 465 (1854).

<sup>51</sup> *Gardner v. Samuels*, 116 Cal. 84 (1897).

<sup>52</sup> See ante p. 639.

the covenant by the lessor with respect to payment is, in substance if not in form, a covenant to buy up or extinguish this real right. Such a covenant is one, the performance of which, i. e., the payment, can enure only to the person who has this real interest to sell, and that person must be the tenant for the time being. Such are cases where the covenant provides that the lessee may remove the fixtures if the lessor does not pay for them,<sup>53</sup> or that the lessor will pay or renew the lease for a stated period,<sup>54</sup> or that the lessee shall have a right to remain in until the payment is made,<sup>55</sup> or that he shall have a lien upon the property for the value of the improvements, or even a mere covenant "to purchase" the improvements,<sup>56</sup> since the fair inference from such a covenant is that the title is to remain in the tenant until payment. Some of the cases above mentioned contain dicta to the effect that, in any case where there is a covenant by the lessee to make improvements, a covenant by the lessor to pay therefor will run, even though the lessee has no real right of the sort above mentioned. This is true only to a qualified degree. The benefit of such a covenant would run until the improvement had been made by any given tenant, whether the lessee or his assignee. The covenant is to pay a person putting improvements upon the land, and that person can be only a tenant, and the covenant enures to his benefit because he makes the improvement. But if the situation contemplated by the lease is that at the expiration thereof all rights of the then tenant in the premises should completely determine, a covenant by the lessor to pay the then tenant for the value of the improvements, irrespective of who put them there, is merely a covenant to pay a sum of money to a person answering a certain description, viz., occupant of the premises at the moment when the lease expires. Such a covenant no more benefits the lessee as such than would a covenant by the lessor to devise his property to the person who answered that description, and will neither bind the assignee of the lessor nor enure to the assignee of the lessee.<sup>57</sup> There are two factors that may exist in this latter case which involve legal principles totally different from those now being discussed. Admitting that this covenant does not

<sup>53</sup> *Hunt v. Danforth*, 2 Curtis 592 (1856).

<sup>54</sup> *Hollywood v. Parish*, 192 Mass. 269 (1906); *Phillips v. Reynolds*, 20 Wash. 374 (1898).

<sup>55</sup> *Batchelder v. Dean*, 16 N. H. 265 (1844); *Hazlewood v. Pennypacker*, (Tex. Civ. App.) 50 S. W. 199 (1899).

<sup>56</sup> *Frederick v. Callahan*, 40 Ia. 311 (1875).

<sup>57</sup> *Gardner v. Samuels*, 116 Cal. 84 (1897); *Wilcox v. Kehoe*, 124 Ga. 484 (1905); *Bream v. Dickerson*, 2 Humph. (21 Tenn.) 126 (1840); contra *Stockett v. Howard*, 34 Md. 121 (1870) *semble*; *Lametti v. Anderson*, 6 Cow. (N. Y.) 302 (1826); see ante p. 645-6.

enure to the assignees of the lease, the original lessee may assign to the assignee of the lease all his contract right against the original covenantor, and the assignee may be able to avail himself of this either by set-off or otherwise: again, this fact or the further fact that the assignee has in good faith put the improvements upon the premises may give him relief upon quasi-contractual grounds, either against the original lessor or his assignee. These considerations are quite outside the scope of this article.<sup>58</sup>

It is commonly stated by the text writers that a covenant to indemnify is collateral. In some cases this is undoubtedly true. Thus, a covenant by or in favor of a third person, not a party to the lease, would not come within the statute of covenants of 32 H. 8, ch. 34 or corresponding modern statutes, and could be only a personal contract.<sup>59</sup> So a covenant that purported to indemnify against loss or damage to other than the rights possessed by the covenantee as tenant of the leasehold would also be collateral. Another application of the same limitation would be in a case where A leased to X and made a covenant which would not run, either because it was intrinsically collateral or because proper phraseology was not used, and A then made a second covenant to indemnify X against all breaches of the covenants contained in the lease. Such a covenant would not run against the assigns of A or to the assigns of X; to hold otherwise would render it possible in substance to make all kinds of covenants run. Compare with these cases, however, the following: A leases to M who covenants, for himself and assigns, to build a house on the demised premises; the lease gives a right of re-entry for breach. M subleases to X and covenants, not for his assigns, to observe and perform, or indemnify X from the proviso and covenants in the head lease to be performed by the mesne lessee or assigns. M assigns to N who does not perform; A enters and evicts X. Held that X has no right of action against N.<sup>60</sup> So far as the covenant to build was concerned N was under no obligation to X in that regard, the assigns not being mentioned, and a covenant to indemnify for a breach of that covenant clearly would not run. On the other hand, a covenant by M that he would so perform the conditions of the head lease that the sublessee should not be evicted should bind M's assignee N. Admitting that N would be under no obligation to X to perform the covenant to build, N was under such an obligation to the head lessor in that regard that the non-per-

<sup>58</sup> See *Conover v. Smith*, 17 N. J. Eq. 51 (1864); *Ecke v. Fetzer*, 65 Wis. 55 (1886); *Berrie v. Woods*, 12 Ont. Rep. 693 (1887).

<sup>59</sup> *Walsh v. Fussell*, 6 Bing. 163 (1829); see *Walsh v. Packard*, 165 Mass. 189 (1896).

<sup>60</sup> *Doughty v. Bowman*, 11 Q. B. N. S. 444 (1848).

formance of the covenant might be, if the head lessor chose to enforce the forfeiture,<sup>61</sup> of direct consequence to the sublessee in that the rights of the sublessee in the demised premises would thereby be terminated. A covenant by the mesne lessee to indemnify against damages resulting from the breach of this last mentioned covenant would also run, for it would be in effect a covenant to make good losses resulting from the breach of a covenant that would itself be binding upon him in favor of the sub-lessee. There is nothing in the opinion of the court in *Doughty v. Bowman* to indicate that it would consider that such a covenant as this latter would not run. In the actual case the covenant was a single one i. e., to indemnify for all breaches of the terms of the head lease. This would include not only those breaches which might result in a forfeiture of the sublessee's interest, but any breaches which would result in damage to the sublessee, whether through forfeiture or otherwise. The court held that this covenant could not be split, and being broad enough to include breaches that would be collateral as regards the sublessee, it could not be held good so far as it related only to breaches that were collateral.<sup>62</sup> This is sound: but it should be noticed that the case does not involve the proposition that a covenant to indemnify is for that reason alone necessarily collateral.<sup>63</sup>

Whether a covenant by the lessor not to compete with the lessee

<sup>61</sup> It was suggested on similar facts in *Dewar v. Goodman*, [1907] 1 K. B. 612, that the fact that the head lessor might not elect to take advantage of the breach by the mesne lessee to enter and terminate the estate of the sublessee showed that the covenant affected the thing demised only in respect of collateral circumstances. This suggestion seems irreconcilable with the position taken by the Court of Appeal in *Horsley v. Steiger*, [1899] 2 Q. B. 79. In that case a lease contained a proviso for re-entry if the lessee should go into liquidation. A corporation, the assignee of the original lessee, went into voluntary liquidation proceedings for the purpose of effecting a reorganization. The court pointed out the difference between bankruptcy and liquidation proceedings, viz., that the latter, unlike the former, do not necessarily involve a dealing with the title; the result of the liquidation proceedings is not per se to vest the title in the liquidator but merely to give him the power to dispose of the title if in his discretion it shall become necessary so to do. The proviso was held, nevertheless, to be enforceable against the assignee of the lessee, providing proper statutory notice of an intent to enforce the forfeiture was given. "It is sufficient if \* \* \* the act relied upon will in the ordinary course of events involve dealing with the interest in, or possession of, the premises" (*Foa, Landlord and Tenant*, 4th Ed. 421). This seems sounder than the view suggested in the *Dewar* case; if the landlord does not enforce the forfeiture this goes to the question of damages, but the possibility that in a given case he may not elect to enforce his rights has very little bearing on the question whether the covenant is or is not adapted to the protection of the covenantee in his rights as lessee.

<sup>62</sup> "If the covenant declared upon presents an alternative, it is merely a covenant to indemnify. Is that then ad idem with a covenant for quiet enjoyment, assuming that that covenant would pass? It is not. It might be broken in other ways than a covenant for quiet enjoyment and is therefore larger. And it cannot be split merely because one breach of it may affect the estate while the other is collateral." *Parke B.*, 11 Q. B. N. S. 454.

<sup>63</sup> *Doughty v. Bowman* was followed in *Dewar v. Goodman*, ante, n. 61.

is more than personal, is a point upon which there is a division of authority. In *Thomas v. Haywood*<sup>64</sup> it was held that a covenant by the lessor not to open a saloon within a mile of the saloon leased to X was not enforceable by X's assignee. On substantially the same facts the opposite conclusion was reached in *Norman v. Wells*.<sup>65</sup> Applying to these cases the principles already suggested as underlying this group, the first question would be as to the nature of the right protected by the covenant. It is clearly a privilege belonging to the lessee as such, it is not the mere selling of liquor that is protected, that privilege he has as owner of the chattel; it is the privilege of selling liquor in this particular place. That he has only because he is the owner for the time being of that place. Thus far there is no difference between the covenant in question and a covenant by the lessor not to build on an adjacent piece in such a way as to darken the rooms in the lessee's house.<sup>66</sup> Both covenants tend to render more valuable the lessee's privileges of action upon the demised premises. The latter covenant clearly would enure to the benefit of the lessee's assignee. Why not the former? While the privileges protected by both covenants must in the last analysis be expressed in terms of human action, as must all rights, there is this difference between them: the privileges protected by the covenant not to build may be said to be exercised by the lessee merely as a human being for the enjoyment of his personal physical needs of air, light, quiet, and the like; the privileges protected by the covenant not to compete are exercised by the lessee because so doing enures in a larger or smaller degree not to his physical benefit as a human being but to his financial benefit as a seller of liquor. This difference may be more briefly and somewhat metaphorically expressed by saying that one covenant enures to the physical benefit of the land, the other to its financial benefit.<sup>67</sup> Whether a distinction should be made between covenants that enure to the benefit of privileges that have their value for the one or the other reason is a point upon which courts may reasonably differ. It should be noticed, however, that in *Thomas v. Haywood* and *Norman v. Wells* the question at issue was merely as to whether the benefit of the covenant ran to the assignee of the lessee as against the original covenantor. The question of running of the burden presents a different problem that will be subsequently considered.<sup>68</sup> Furthermore, even assuming that the burden of such a covenant should not run in a

<sup>64</sup> L. R. 4 Ex. 311 (1869).

<sup>65</sup> 17 Wend. (N. Y.) 136 (1837).

<sup>66</sup> See *Ricketts v. Enfield Churchwardens*, [1909] 1 Ch. 544, post p. 656.

<sup>67</sup> See *Holmes, J.*, in *Norcross v. James*, 140 Mass. 188 (1885).

<sup>68</sup> See post p. 656 and following.

conveyance of the fee, it should be noticed that there is a marked difference between an attempt to tie up land in perpetuity and the restriction given by the lessor for the term of an ordinary short term lease.

To restate, in a word, the characteristics of the two groups into which the covenants that have been examined are divisible, it may be said that the reason why the first kind of what are essentially contract relations will pass with a conveyance of the title, the bond that connects them with the land, is found in the nature of the burden created by the covenant. It is fundamentally a limitation upon rights that form a part of the title to the land. As to the second group the basis of its connection with the land is in the character of the benefit conferred. It is fundamentally a benefit to the person who has the title and in respect of the title. There remains for consideration this question: if the obligation imposed by the covenant limits the real rights of the covenantor so that the burden of it will pass to his assignee, is it necessary, in order that the rights under that covenant should pass to the assignee of the covenantee, that it should benefit him with respect to the real rights that he has as such assignee? A similar question may be put as to covenants of the second class, or the whole problem may be more generally stated thus: if either the burden or the benefit of a covenant has the connection with the title outlined above, will both ends of the covenant run or will each end run only as it has this connection?

Taking first those covenants where the connection with the title is found in the nature of the burden thereby created, it will be remarked that many of those covenants that limit the lessee in the exercise of his privileges or rights as such lessee do in fact necessarily satisfy both these requirements.<sup>69</sup> It is not universally true, however, and whether it is true in any given case may depend upon the question of fact as to the lessor's motive in taking the covenant. Thus suppose A leases to X a shop and takes a covenant from X that he will not use the shop for the sale of liquor. A may take this covenant because he believes that the use of the premises for a saloon will make his reversionary interest worth less, or because he has other property in the neighborhood that will be depreciated in value by the existence of a saloon, or because he runs a neighboring saloon, or because he is opposed on principle to the sale of liquor. On the first supposition he is taking the covenant in his character as landlord and to protect his reversionary interest; on the next two suppositions he is taking it to protect his other premises and

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<sup>69</sup> See ante pp. 640-1, 642.

on the last supposition he is taking it for purely personal reasons entirely unrelated to his ownership of any land.<sup>70</sup> If now X assigns his lease to Y, A ought to be able to enforce this covenant against Y. To say that Y takes the title minus this privilege is to beg the question: this much is certain however; viz. that the covenant in question was intended to be an inseparable limitation upon the freedom of action of the lessee with respect to that land. The land was A's and if he chose to part with it only subject to this restriction as to its use his motive in creating that restriction should make no difference. There are several cases in which it has been held or stated that a covenant taken by the lessor obviously for his benefit not as owner of the reversion but of another business is binding upon the assignee of the lessee.<sup>71</sup>

If now A assigns his reversionary interest to B it seems clear that B ought not to be able to enforce this covenant. Ex hypothesi it was taken not for the benefit of A's reversion but for some other purpose: the fact that it is a limitation on the estate held by X or his assignee Y would seem immaterial unless it can be shown that B has the interest that was intended to be benefitted by the covenant. There is very little authority on the point. In *Clegg v. Hands*<sup>72</sup> the judges all agreed that the right to enforce such a covenant did pass although they rested the decision on other grounds. LOPES L. J. said<sup>73</sup> "In my opinion it (the covenant to sell only beer furnished

<sup>70</sup> The fact that the covenant is incorporated in the lease raises a presumption that it was meant to be an integral part of the group of correlative rights and duties created thereby; and if it is an open question whether the covenant was taken as an incident to the reversion or otherwise, it ought to be regarded as belonging legally with the other rights created by the same instrument and pass with the reversion. Furthermore, A in assigning to B may not only assign to him his reversionary interest in the premises but in addition thereto his contract rights against the lessee. In any of these situations B is entitled, for one reason or the other, to enforce the covenant. Most of the cases are of this kind. See *Clegg v. Hands*, L. R. 44 Ch. D. 503 (1890); *White v. Southend Hotel Co.*, [1897] 1 Ch. 767; *Manchester Brewing Co. v. Coombs*, [1901] 2 Ch. D. 608.

<sup>71</sup> *Uxbridge v. Staveland*, 1 Ves. Sr. 56 (1747) *semble*; *Jones v. Edney*, 3 Camp. 285 (1812); *Clegg v. Hands*, L. R. 44 Ch. D. 503 (1890); *White v. Southend Hotel Co.* [1897] 1 Ch. 767; *American Strawboard Co. v. Haldeman Paper Co.*, 83 Fed. 619 (1897).

*Congleton v. Pattison*, 10 East 130 (1808) is apparently the only decision the other way. A leased to X a mill and took a covenant from X that no non-parish laborers should be employed in the mill who did not have a settlement in some other parish. Lord Ellenborough held that this covenant was not enforceable by the lessor against the assignee of the lessee. He said \* \* \* "How then does it (the covenant) affect the mode of occupation? \* \* \* The carrying on of a particular trade may do that, but where the work to be done is at all events the same, whether it be done by workmen from one parish or another cannot affect the mode of occupation." This statement is, it is submitted, unsound. A covenant not to employ a particular class of laborers in a mill is a limitation upon the privileges of the lessee, as such, just as much as a covenant not to make or sell a particular article on the premises.

<sup>72</sup> L. R. 44 Ch. D. 503 (1890).

<sup>73</sup> *Ibid.* p. 523.



by the lessor or his assigns) touches and concerns the demised premises and *therefore*<sup>74</sup> it runs with the reversion."<sup>75</sup> *Thurston v. Minke*<sup>76</sup> is a decision the other way. In that case the facts were these: A owned two parcels of land, on one of which was a hotel. He leased the other lot to X with a proviso that no building erected thereon should exceed three stories in height. A later sold the reversion to B, keeping the hotel parcel. A was allowed to enjoin X against a subsequent attempt to erect on the leased lot a building of more than three stories. The contention that the benefit of the proviso passed to the assignee of the reversion was overruled by the court, it finding that the proviso was inserted for the benefit of A not as lessor but as owner of the hotel lot. This decision, though purporting to go on equitable grounds, seems also correct as to the running at law of such a covenant. It is submitted that there is nothing in the 32 H. 8, ch. 34, properly construed, that compels the doctrine that if one end of a covenant runs with the leasehold interest the other must necessarily run with the reversion. Just as a leasehold may be burdened with an easement in favor of another piece of land<sup>77</sup> so on principle it may be burdened with a covenant in favor of another piece of land and the runnings of such a covenant would be determined not by statute but by the common law.

Only a few words are needed as to the application of a similar limitation to the covenants of the lessor. What has been said with respect to the lessee's covenants is equally applicable, *mutatis mutandis*, to the lessor's covenants. One may go even farther. The lessee's estate is a subordinate estate; out of the fee simple of A is carved the smaller estate of X. It is derived from A, and hence, as was pointed out,<sup>78</sup> any limitation on the rights of that estate, no matter why imposed, should be enforceable by A personally against any subsequent taker of the lease. Such of course is not the relation of A's estate to X's estate, and hence it may well be doubted on principle whether even the original covenantee, the lessee, could enforce as against an assignee of the reversion a covenant that did not, in addition to restricting the rights comprised in the reversionary title, also operate to the benefit of the lessee with respect to his rights as such. Practically all covenants by the lessor do however satisfy both these requirements. The only covenants by the lessor

<sup>74</sup> My italics.

<sup>75</sup> Acc. *Hamley v. Hendon*, 12 Mod. 327 (1699) semble. See also *White v. Southend Hotel Co.*, ante p. 653; *Zetland v. Hislop*, L. R. 7 A. C. (Sc.) 427 (1882); *Foa, Landlord & Ten.* 4 ed. 435.

<sup>76</sup> 32 Md. 487 (1870).

<sup>77</sup> *Cole's Case*, 1 Salk. 196 (1692); *Newhoff v. Mayo*, 48 N. J. Eq. 619 (1891).

<sup>78</sup> Ante, p. 653.

that suggest this question are the covenants to renew the lease and to convey the fee simple.<sup>79</sup> Both of these are covenants relating to and curtailing the privilege of exercising powers of the holder of the reversionary interest. A covenant to renew or extend the lease, technically speaking, can be of value only to the tenant for the time being because the lease can be renewed only to the present holder. On the other hand a covenant to grant a new lease, if it be taken literally, or a covenant to sell the fee simple, is a covenant the performance of which will not enure to the tenant with respect to the rights that he now has. It is merely a chance to buy an interest in land and that chance is substantially as valuable to a person whether or not he is now tenant. Hence the question whether the covenant is, under 32 H. 8, ch. 34, real or personal, would on principle not be difficult of answer. Such a covenant would seem clearly personal. How far the American cases are necessarily in conflict with this doctrine it is hard to say. Practically all the cases are for specific performance. So far as the rights of the lessee go, he can enforce his equitable interest against any purchase of the reversion with notice quite aside from the question whether the covenant is real or personal; so far as the rights of an assignee of the lessee go, he will succeed in his bill for specific performance if he shows that the original covenantee's right has been vested in him, and whether this right has come as a real covenant attached to the lease or as a personal claim transferred by some general language of assignment is ordinarily immaterial.

There now remains for consideration the converse of the problem just discussed, namely: if the covenant enures to the covenantee in respect of his rights as lessee or lessor so that the benefit of the covenant will pass to his assignee, will the burden pass to the assignee of the covenantor irrespective of whether it limits his rights as owner or imposes an obligation upon him not necessarily related to the land? Here as elsewhere it should be noticed that most covenants do in fact satisfy both requirements.

As to covenants by the lessee the answer is clear on the authorities: if the covenants benefit the lessor with respect to his reversionary interest they will bind the assignee of the lessee irrespective of whether or not the covenant limits the lessee's rights or privileges. The covenants to insure and to pay taxes<sup>80</sup> are cases of this kind. The rule can be justified on principle because of the derivative nature of the lessee's estate; and the fact that these acts beneficial

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<sup>79</sup> These cases are cited ante p. 643.

<sup>80</sup> Ante pp. 644, 647.

to the lessor as such are in the nature of a continuing quid pro quo for the land.

Whether the burden of a covenant by the lessor that benefits the lessee as such should merely for that reason, follow the reversion into the hands of an assignee is more difficult of decision. It is arguable that the second section of 32 H. 8, ch. 34, which gives the lessee and his assigns the same rights against the assignee of the lessor as against the lessor will produce the same result that follows from the subordinate nature of the lessee's estate in the situation just considered, and that since the covenant is made by the lessor for the purpose of benefitting the lessee's estate it is for this reason alone within the purview of the statute. So far as the decisions go those that deal with the liability of the assignee of the lessor under these circumstances hold him to be bound.<sup>81</sup>

Admitting that there may be covenants of this sort binding upon the assignee of the lessor although not affecting his rights or privileges as owner of the reversion, there is a further limitation upon this possibility that should be noticed. The act to be performed by the covenantor may be an act the locus of the performance of which is a matter of indifference (as a covenant to purchase the improvements), or it may necessarily be performable on the demised premises (as a covenant to install a heating plant), or it may necessarily be performable upon or the covenant may be to refrain from performance upon another specified piece of land. The first two cases present no difficulty once it is admitted that a covenant by the lessor may bind his assignees even though it does not limit his reversionary rights. As regards the third case the fact that the covenant is performable elsewhere should not affect the running of the benefit,

<sup>81</sup> Ante p. 647 and following. See also, *Mansel v. Norton*, L. R. 22 Ch. D. 769 (1883); *Gerzebek v. Lord*, 33 N.J.L. 240 (1869); *Myers v. Burns*, 35 N.Y. 269 (1866); *Storandt v. Vogel & Binder Co.*, 140 N. Y. App. Div. 671 (1910).

<sup>82</sup> To this effect are *Ricketts v. Enfield Churchwardens* [1909] 1 Ch. 544; *Morris v. Kennedy* [1896] 2 I. R. 247; *Norman v. Wells*, 17 Wend. (N. Y.) 136, (1837), ante p 651 n. 65-66. Compare *Thomas v. Haywood*, L. R. 4 Ex. 311, (1869), ante p. 651 n. 64. In *Dewar v. Goodman*, [1907] 1 K. B. 612, [1908] 1 K. B. 94, [1909] A. C. 72, the facts were these: A leased to M on long term lease a tract of land containing 200 buildings with a covenant by M and upon condition that he should keep the buildings in repair. M sub-leased two buildings to X taking a covenant from X to keep the two buildings in repair and covenanting with X to perform so much of the covenants and conditions in the head lease as related to the premises not included in the sub-lease. All the covenants and conditions purported to bind and enure to assigns. A assigned to B, M to N, and X to Y. N did not keep in repair the buildings not included in the sub-lease and B entered and retook possession of the entire tract including the two buildings of the sub-lease. N was held not liable to Y for breach of covenant. That the act was not to be performed upon the premises included in the sub-lease was apparently regarded by some of the judges as determining its character as a personal covenant even with respect to the benefit.

since that is *ex hypothesi* connected with the lessee's estate.<sup>82</sup> If the lessor assigns the reversion and the other piece to different persons, it becomes necessary to determine in what capacity the lessor has covenanted. Since he owns both pieces it is conceivable that he should have intended to covenant not as the lessor but as the owner of the other piece. In such a case the obligations of that assignee would not come within the scope of 32 H. 8, ch. 34 but would depend on common law principles. Since in England the burden of a covenant will not run at law except between landlord and tenant,<sup>83</sup> the purchaser of the second piece would not be liable to an action at law; whether he would be liable in equity would depend on whether the covenant was negative or affirmative and whether he took with or without notice.<sup>84</sup> Since in this country the burden of a covenant will in most jurisdictions run at law there would seem no reason on principle why such a covenant should not be held binding upon a purchaser of the burdened piece.<sup>85</sup>

If the covenant does not bind the assignees of the other piece it would seem that the burden would necessarily be personal to the lessor; to hold the assignees of the reversion upon such a covenant would be to make them guarantors of the performance of a covenant over which they had no control. If this be true it would follow that the fact that the reversion and the second piece were in a given case both conveyed to the same person should make no difference. The covenant being in its nature essentially personal, the fact that the particular assignee of the reversion could legally perform the covenant because he happened also to be the owner of the land upon which the performance was to be made, would be immaterial. It is submitted that this is the ground upon which the decision in the case of *Dewar v. Goodman*<sup>86</sup> could most safely have been rested.<sup>87</sup>

There is a third group of covenants, few in number, to which reference should be made for the sake of completeness. Those are the covenants that merely repeat in terms of contract an already

<sup>82</sup> See *Austerberry v. Oldham*, L. R. 29 Ch. D. 750, 780 (1885).

<sup>84</sup> *Haywood v. Brunswick Building Society*, L. R. 8 Q. B. D. 403 (1881). As to the possibility of the covenant being made binding upon the second piece of land, compare *Kemp v. Bird*, L. R. 5 Ch. D. 549 (1877); *Ashby v. Wilson*, [1900] 1 Ch. 66.

<sup>85</sup> In *Noonan v. Orton*, 27 Wis. 300 (1870), the court held the purchaser of the second piece bound by the covenant in favor of the lessee. Compare *Taylor v. Owen*, 2 Blackf. (Ind.) 301 (1830).

<sup>86</sup> Ante, p. 656, n. 82.

<sup>87</sup> To the same effect is *Hebert v. Dupaty*, 42 La. Ann. 343 (1890). Compare *Vyvyan v. Arthur*, 1 B. & C. 410 (1823), post. p. 658, n. 88. In *Athol v. R. R.*, Ir. Rep. 3 C. L. 333 (1868) a covenant by the lessor that the lessee might draw the surplus water from the lessor's canal was held enforceable by an assignee of the lessee against an assignee of the lessor of both reversion and canal. Though couched in terms of covenant, the right created in this case is clearly an easement.

existing obligation running from the covenantor to the covenantee. The covenant to pay rent is the most obvious illustration of this type of covenant. Whether historically the covenant to pay rent is not to be differentiated from the covenants hitherto considered raises a different question, but for purposes of the present classification, it belongs in this third group.<sup>88</sup> Another covenant by the lessee of the same species is the covenant to commit no waste. A similar covenant by the lessor is the covenant for title that the lessee shall quietly enjoy the demised premises.<sup>89</sup> This is the case where the scope of the express covenant is no greater than the common law liability of the lessor; if it is greater, the covenant falls in the second group already discussed.<sup>90</sup>

To summarize with respect to the first two groups, for as just pointed out, the third group is *sui generis* and requires no comment: One clean-cut category of covenants, viz., those restricting the real rights of the lessee, will run with the leasehold under all circumstances; a second group, those covenants by the lessee that benefit the lessor with respect to his reversionary estate, as defined herein, will run both with the leasehold and with the reversion. covenants by the lessee of the first sort ought not to run with the reversion unless they also satisfy the test of the second group; it is doubtful if this latter statement represents English law; there seems to be nothing in the American decisions opposed to it. Covenants by the lessor of the first class will almost universally satisfy, also, the test of the second class, i. e., benefit the lessee as such: they should be purely personal unless they do: this is true of the English decisions and in most cases of the American decisions:

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<sup>88</sup> See *Athoe v. Hennings*, 1 Rolle 80, s. c. Bulst. 281 (1615). Cases holding the covenant to pay rent binding on the assignees of the lessee are *Stevenson v. Lambard*, 2 East 575 (1802); *Webster v. Nicolls*, 104 Ill. 160 (1882); *Jones v. Gundrim*, 3 W. & S. (Pa.) 531 (1842); so of a rent in kind, *Beach v. Barons*, 13 Barb. (N. Y.) 305 (1850). That the amount of rent is to be fixed by reference to extrinsic transactions does not affect the running of the covenant; thus: amount of rent fixed by amount of traffic over railroad, *Hemingway v. Fernandes*, 13 Sim. 228 (1842); *Hastings v. Eastern Ry.*, [1898] 2 Ch. 674; see also *Keppel v. Bailey*, 2 M. & K. 517 (1834); fixed by amount of damage done other land of lessor, *Norval v. Pascoe*, 34 L. J. Chan. N. S. 82 (1864); fixed by amount of grain raised on land, *Raphoe v. Hawksworth*, 1 Huds. & Br. 606 (1828); fixed by amount of oil obtained from land, *Fennell v. Guffey*, 139 Pa. St. 341 (1890).

In *Vyvyan v. Arthur*, 1 B. & C. 410 (1823) the lease contained this clause after the *reddendum*, "doing suit to the mill of the said Thomas (the lessor) his heirs and assigns \* \* \* by grinding all such corn there as should grow in or upon the close demised." Action was allowed by the assignee of the lessor of both mill and reversion against the administrator of the lessee for breaches both before and after the lessee's death. Unless the case is to be sustained upon the theory that this reservation amounted to a rent service, it seems wrong. See also *Raphoe v. Hawsworth*, *supra*.

<sup>89</sup> *Shelton v. Cochrane*, 3 Cush. (Mass.) 318 (1849).

<sup>90</sup> Ante p. 641 and following.

if the covenant benefits the lessee as such the benefit thereof will pass to his assignee; even though the covenant does not also restrict the estate of the lessor it seems clear that the 32 H. 8, ch. 34 or similar American statutes, will cause the burden of this covenant to pass to the assignee of the reversion unless the locus of the act is on another piece of land, in which case both in this country and in England either it binds the assignees of the other piece or is personal to the lessor.

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